Supreme Court, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1174

IN THE

Supreme Court of the United States

October Term, 1986

Douglas A. Holmberg,

Petitioner,

v.

Rodney C. Morrisette and Mintex Corporation, a Minnesota corporation,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner's Supplemental Brief In Support of Petition For Writ of Certiorari

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1987—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

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REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioner respectfully submits this supplemental brief in support of its petition for writ of certiorari.

This supplemental brief is offered to bring to the Court's attention the recent decisions in *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986), *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987), *Marks v. Forster*, 811 F.2d 1108 (7th Cir. 1987), and *International Data Bank*,

Ltd. v. Zepkin, No. 86-2052 (4th Cir. Feb. 20, 1987) (available Feb. 25, 1987, on WESTLAW, CTA database.)

A. The Eighth Circuit's decision in the present case sharply conflicts with the Second Circuit's recent decision in Ianniello.

In *United States v. Ianniello* the Second Circuit offered a detailed discussion of the pattern requirement under the Racketeer Influenced and Corrupt Organizations Act ("RICO" or the "Act"). *United States v. Ianniello*, 808 F.2d 189-193. The Second Circuit strictly construed RICO and concluded that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise that the elements of a pattern of racketeering activity have been satisfied. *Ianniello*, 808 F.2d at 192. In *Ianniello*, the Second Circuit expressly rejected the Eighth Circuit's definition of pattern of racketeering activity as expressed in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). The Second Circuit observed that the multiple scheme requirement that is favored by the Eighth Circuit would create incongruous results. *Ianniello*, 808 F.2d at 192.

The Second Circuit's decision in *Ianniello* is critical because it demonstrates that the circuits have created two different standards of review: one for criminal RICO and one for civil RICO. The government has enjoyed considerable success using criminal RICO. That success would be jeopardized if the relaxed, broader standard articulated by the Eighth Circuit in the instant case were adopted. In *Ianniello* two criminal acts in furtherance of an enterprise were sufficient to support a criminal conviction. In the instant case and under the multiple scheme test articulated

by the Eighth Circuit, two criminal acts would not necessarily support a conviction under RICO. Ultimately, the viability of the Act in both the criminal and civil arenas will be undermined by the growing confusion among the circuits.

B. The recent decisions of the Fourth, Seventh and Tenth Circuits' demonstrate an abundance of confusion with respect to the meaning of a pattern of Racketeering Activity.

In *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987), the court did not discern a pattern of racketeering activity, but readily conceded that it was having difficulty resolving this troublesome question and that it was unable to formulate ". . . a bright-line test in the abstract . . ." regarding the definition of a pattern of racketeering activity. *Id.* at 929. The court apparently concluded that because the scheme involved only one victim it must have only involved one fraudulent scheme. Therefore, the elements of a "pattern" had not been satisfied. *Id.* at 929. The court, however, proceeded to appologize for its inability to provide ". . . precise guidance on this troublesome issue . . ." *Id.* at 929.

In *International Data Bank, Ltd. v. Zepkin*, No. 86-2050. (4th Cir. Feb. 20, 1987), the Fourth Circuit conceded that plaintiff's RICO claim was not properly before the court but, nevertheless, contributed to the confusion surrounding RICO by holding that the RICO claim would be deficient with respect to the pattern requirement. After reviewing various conflicting opinions, the Fourth Circuit concluded "[I]n our view, no mechanical test can determine the existence of a RICO pattern". *International Data Bank v.*

Zepkin, slip. op. at 15. Without a mechanical test or any "precise guidance", the court applied a status test which had been previously rejected by this Court in *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). The Fourth Circuit concluded that "[T]he pattern requirement was intended to limit RICO to those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits such crimes". *International Data Bank v. Zepkin*, slip. op. at 14. In the Fourth Circuit the status of the defendant as one who regularly committed racketeering acts and not the character of the acts appears dispositive on the question of the definition of a pattern of racketeering activity.

In *Marks v. Forster*, 811 F.2d 1108 (7th Cir. 1987), in finding that a pattern did not exist, the Seventh Circuit was forced to distinguish at least three prior Seventh Circuit decisions on the question. *See, Illinois Department of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985); *Lipin Enterprises v. Lee*, 803 F.2d 322 (7th Cir. 1986); *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986). The court's tortured analysis in *Marks* highlights the difficulties that circuit and district courts are faced with when they depart from the plain language of the Act. In *Marks*, despite the court's best efforts, it was unable to provide any meaningful guidance on the definition of a "pattern" of racketeering activity.

In the Second Circuit, one victim and two predicate acts appear to be sufficient to satisfy a pattern of racketeering activity. In the Eighth Circuit, multiple victims, acts and criminal schemes are necessary to satisfy the pattern requirement. The Fourth Circuit is admittedly uncertain of the requirements and in the Seventh Circuit there are at least four different definitions with no single common thread.

CONCLUSION

The *Ianniello* decision demonstrates a sharp division between the Second and Eighth circuits. It also contributes to the double standard that is being created for civil and criminal RICO. That double standard may ultimately undermine RICO's effectiveness in the criminal area.

The aforementioned cases also underscore the significant confusion that exists among the circuits and illuminates the need for the Supreme Court's consideration of this troublesome question. For the reasons set forth herein, petitioner respectfully requests that a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on September 3, 1986.

Respectfully submitted,

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